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Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

LARRY FELDMAN
A/K/A LARRY FLEMING
A/K/A LARRY GIVNER,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Susan G. James
Attorney for Petitioner
Law Offices of
Susan G. James & Associates
600 S. McDonough Street
Montgomery, Alabama 36104
334-269-3330

QUESTIONS PRESENTED FOR REVIEW

1. Certiorari should be granted to resolve a split among the circuits with regard to whether clarifying amendments to the United States Sentencing Guidelines (U.S.S.G.) should be applied retroactively in a 28 U.S.C. §2255 habeas corpus petition.

2. Certiorari should be granted to resolve whether the holding of Stinson v. United States, 508 U.S. 36, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993) is limited to direct appeals, or applicable to post-appellate proceeding such as 28 U.S.C. §2255 petitions.

PARTIES TO THE PROCEEDING

The caption in this case contains the name of all the parties.

TABLE OF CONTENTS

	page
Questions Presented for Review.....	i
Parties to the Proceeding.....	ii
Table of Contents.....	iii
Table of Citations.....	iii
Opinions Below	1
Statement of Jurisdiction.....	1
Statute Involved.....	1
Statement of the Case.....	2
Argument.....	3
Conclusion.....	17
Appendix.....	19
A. Judgment of Eleventh Circuit Court of Appeals	
B. Judgment of District Court	

TABLE OF CITATIONS

Cases

Feldman v. United States, 940 F.2d 673 (11th Cir. 1991) 13

Isabel v. United States, 980 F.2d 60 (1st Cir. 1992). 4,13,14,15

Keats v. United States, 856 F.Supp. 162 (S.D.N.Y. 1994) 13

McClesky v. Zant, 499 U.S. 467, 492, 11 S.Ct. 1454 (1991) 14

Stinson v. United States, 508 U.S. 36, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993) . 3,4,7,8,17,18

United States v. Benitez, 34 F.3d 1489 (9th Cir. 1994) 16

United States v. Brown, 29 F.3d 9543 (5th Cir. 1994) 17
United States v. Bugh, 28 F.3d 1084 (11th Cir. 1994) 12

United States v. Dedeker, 961 F.2d 164, n. 4 (11th Cir. 1992) 11

United States v. Foy, 28 F.3d 464 (5th Cir. 1994) 13

United States v. Gardiner, 955 F.2d 1492 (11th Cir. 1992) 13

United States v. Howard, 923 F.2d 1500 (11th Cir. 1991) 13

United States v. Kissick, 69 F.3d 1408 (10th Cir. 1995) 13

United States v. Louis, 967 F.2d 1550, 1553 (11th Cir. 1992) 14

United States v. Marin, 916 F.2d 1536 (11th Cir. 1990) 11

United States v. Mitchell, 31 F.3d 271 (5th Cir. 1994) 17

United States v. Shores, 966 F.2d 1383, 1388 (11th Cir. 1992) 14

United States v. Shriner, 967 F.2d 572 (11th Cir. 1992) 11

United States v. Wilson, 997 F.2d 429 (8th Cir. 1993) 13

Statutes

18 U.S.C. §3582(c)(2) 2, 12

28 U.S.C. §2255 . . . . . 1, 2, 3, 5, 6, 13, 14, 15, 18

Other

Prison Litigation Reform Act of 1996 . 15

U.S.S.G. §1B1.3 2,4,11,13

U.S.S.G. §2D1.1 16

U.S.S.G. §3C1.1 2,4,5,6,7,8,9,11,13,16

STATEMENT OF JURISDICTION

On December 6, 1996, the United States Court of Appeals affirmed the decision of the United States District Court for the Southern District of Alabama. This petition is timely filed within 90 days of said date.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(i).

OPINIONS BELOW

1. The Eleventh Circuit Court of Appeals affirmed per curiam the District Court's judgment. (Appendix A).

2. The District Court for the Southern District of Alabama denied Petitioner's 28 U.S.C. §2255. (Appendix B).

STATUTES INVOLVED

The body of the document contains the certain guideline provisions at issue.

STATEMENT OF THE CASE

On June 1, 1989, a superseding indictment was filed in the United States District Court for the Southern District of Alabama, charging 24 codefendants, including Larry Feldman, a/k/a/ Larry Fleming (hereinafter referred to as Petitioner) with violating various drug laws. Petitioner's trial was severed, and he was tried as a single Defendant.

Petitioner was tried before the Hon. Alex Howard, U.S. District Court Judge for the Southern District of Alabama. On November 17, 1989, a jury found Petitioner guilty of Count 4, violating 21 U.S.C. §846, conspiracy to commit a drug trafficking offense. On February 1, 1990, the District Court sentenced Petitioner to 235 months imprisonment without parole, plus five years' supervised release.

Petitioner appealed his conviction to the Eleventh Circuit Court of Appeals which affirmed his conviction and sentence without opinion on August 1, 1991.

Petitioner filed a motion pursuant to 28 U.S.C. §2255, or, in the alternative, 18 U.S.C. §3582(c)(2), before the District Court on October 27, 1995. Petitioner argued that subsequent amendments to the commentary to United States Sentencing Guidelines (U.S.S.G.) §§1B1.3 (relevant conduct) and 3C1.1 (obstructing or impeding justice) enabled him to collaterally attack his sentence, and that he should have been given a downward reduction for playing a minor role, if any, in the Richard Lynn organization. The District Court denied Petitioner's §2255 motion without a hearing on April 3, 1996, holding that

Petitioner's conviction and sentence were not "otherwise subject to collateral review." Petitioner appealed the denial of his §2255 petition to the Eleventh Circuit Court of Appeals, which affirmed without an opinion on December 6, 1996.

Petitioner now seeks the review of this Court.

ARGUMENT

1. Certiorari should be granted to resolve a split among the circuits with regard to whether clarifying amendments to the United States Sentencing Guidelines (U.S.S.G.) should be applied retroactively in a 28 U.S.C. §2255 habeas corpus petition.

2. Certiorari should be granted to resolve whether the holding of Stinson v. United States, 508 U.S. 36, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993) is limited to direct appeals, or applicable to post-appellate proceeding such as 28 U.S.C. §2255 petitions.

Because the two questions presented for this Court's review are interrelated, and must be considered in pari materia, Petitioner presents both questions as part of the same overarching argument.

On direct appeal, Petitioner argued that the District Court abused its discretion in refusing to hold an evidentiary hearing. Petitioner contended that the affidavits of Jack Marshall, Kevin Sheehy, Robert Eyster, and Butch McKeown, all of whom were leaders and organizers in the Richard Lynn

organization, conclusively proved that Petitioner was not a member of the conspiracy.

Petitioner also argued that subsequent clarifying amendments to United States Sentencing Guideline (U.S.S.G.) Rules §3C1.1 and §1B1.3 commentary established that Petitioner was entitled to be resentenced pursuant to the new comments, and established a means of collateral attack upon Petitioner's sentence. Petitioner also argued that he was improperly denied a four-step decrease in his sentence for playing a minor role (if any) in the criminal conspiracy.

The District Court's ruling which was affirmed without opinion by the Eleventh Circuit Court of Appeals is in direct conflict with this Court's decision in Stinson v. United States, 508 U.S. 36, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993), which held that clarifying amendments to the U.S.S.G. must be considered in correcting a defendant's sentence, even after the direct appeal is concluded. Further, the Eleventh Circuit's decision is at odds with the First Circuit Court in Isabel v. United States, 980 F.2d 60 (1st Cir. 1992), and Tenth Circuit in United States v. Kissick, 69 F.3d 1048 (10th Cir. 1995).

This petition for certiorari deals primarily with the related issues of whether clarifying amendments to the U.S.S.G. Comments are applied retroactively in a post-appellate habeas corpus petition. Petitioner has noted a split among the circuits with regard to this issue, and asserts that Stinson and its progeny establish that clarifying amendments to the U.S.S.G. are to applied not only on

direct appeal, but in a proceeding after a direct appeal, such as a 28 U.S.C. §2255 petition.

(1) U.S.S.G. §3C1.1

Petitioner was sentenced on February 1, 1990. The United States Sentencing Guidelines (U.S.S.G.) were modified November 1991, subsequent to Petitioner's sentencing.

As argued in his §2255 motion, the District Court relied upon the fact that Petitioner discussed moving some of roommate Marshall's[1] belongings (notably, two cars and a boat) as a rationale for Petitioner's enhancement for obstruction of justice. Petitioner, in fact, never moved Marshall's cars or boat. The evidence was to the contrary. Petitioner was punished for the mention of a possible future attempt that was never made.

Subsequent to the Givner sentencing, the trial transcript of Jack Marshall was obtained. A review of that transcript revealed that on the day of the search of the Givner/Marshall residence the two vehicles Givner had discussed moving (the same two relied on by the Court for the 3C1.1 enhancement) were present. This is revealed through the trial testimony of DEA Agent Jay Bergman at the Marshall trial as noted:

---

[1]This was after Marshall's arrest and incarceration but before Givner's arrest. The conversation was had with cooperating individual, Michael Golden, who was not a member of the Lynn organization.

> Q. Were the vehicles present at the time of the search of the residence?
>
> A. Yes. In the pictures, here, the Delorean and the Jaguar were present. (Marshall TR, Exhibit 1 to 2255)

This is evidence that the vehicles were never moved. Givner could not by talking about moving them have obstructed justice.

The §3C1.1 enhancement, however, does not hinge on someone's discussion of a future attempt, but, instead, on whether the conduct actually impeded or obstructed justice.

U.S.S.G. §3C1.1 has been modified subsequent to Petitioner's sentencing on February 1, 1990. Petitioner's direct appeal was denied in July 1991. The §3C1.1 amendment was not effective until November 1991. Therefore, the rationale upon which the Government and the Court relied at Petitioner's sentencing regarding §3C1.1 enhancement has changed. The guideline modification is now more favorable to Petitioner's position which was argued at sentencing and affirmed on direct appeal.

Section 3C1.1, U.S.S.G., Willfully Obstructing or Impeding Proceedings, applicable in 1987 read as follows:

> If the defendant willfully impeded or

> obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the offense level from Chapter Two by 2 levels.

Section 3C1.1 U.S.S.G., Obstructing or Impeding the Administration of Justice, applicable today reads as follows:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense by 2 levels.

These changes applicable in 1991 alter little more than the inclusion of an obstruction enhancement for conduct during the sentencing phase. However, there are other changes noted in the commentary that make more significant modifications to U.S.S.G. §3C1.1. Specifically, the expansion of the materiality element is the most obvious and the most applicable in the case at bar.

Clarifying amendments to the U.S.S.G. are binding. Stinson v. United States, 508 U.S. 36, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993). It is noteworthy that in Stinson, the clarifying amendment to U.S.S.G. §4B1.2 occurred after the Eleventh Circuit Court of

Appeals' affirmation of the petitioner's conviction and sentence. Stinson, 508 U.S. at 39. Therefore, it follows that under the authority of Stinson, a clarifying amendment must be considered for correcting a sentence, even when the direct appeal has been concluded.

In 1990, when Petitioner Givner was sentenced, the standard associated with §3C1.1(e) as applied to information given the Probation Officer was as follows:

> (e) furnishing material falsehoods to a probation officer in the course of a presentence or other investigation for the court.

Section 3C1.1 U.S.S.G. Commentary, Application Notes, 3, (f), (g), and (h), read as follows:

> (f) providing materially false information to a judge or magistrate;
>
> (g) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;
>
> (h) providing materially false information to a

> probation officer in respect to a presentence or other investigation for the court.

Section 3C1.1, U.S.S.G., (1991), of the Commentary reads as follows:

> 4. The following is a non-exhaustive list of examples of the types of conduct that, absent a separate count of conviction for such conduct, do not warrant application of this enhancement, but ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range.

In addition, Sections (a), (b), (c), and (d) provide the following:

> (a) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;
>
> (b) making false

> statements, not under oath, to law enforcement officers, unless Application Note 3(g) above applies;
>
> (c) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;
>
> (d) avoiding or fleeing arrest (see, however, Section 3C1.2 (Reckless Endangerment During Flight)).

Section 5 goes on to define "material" as follows:

> 5. 'Material' evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or information, that, if believed, would tend to influence or affect the issue under determination.

A review of the above distinctions between the guidelines applicable in 1987 which were applied in Petitioner's case and those applicable in 1990 and today reveal that this Petitioner's conduct, even if true, never

occurred and did not impede or obstruct an investigation. The Government has the burden of proving the applicability of a Guideline section which would increase the offense level. United States v. Shriner, 967 F.2d 572 (11th Cir. 1992).

In United States v. Marin, 916 F.2d 1536 (11th Cir. 1990), this Court held that the sentencing court should consider clarifying amendments when interpreting the Guidelines, even when sentencing defendants who were convicted before the effective date of the amendments. U.S.S.G. §3C1.1 amendments are clarifying in nature, not substantive. United States v. Dedeker, 961 F.2d 164, n. 4 (11th Cir. 1992).

(2) U.S.S.G. §1B1.3.

At Petitioner's sentencing, the District Court did not make a foreseeability finding or delineate the quantity of drugs with which Petitioner was alleged to have been involved. Subsequent to sentencing, however, the guidelines were modified to require such a finding (U.S.S.G. §1B1.3, Commentary, Application Note Number 2), and case law has developed that requires findings more specific than merely the amount of drugs involved in the conspiracy.

The wording of 1B1.3(a) was changed to read the following:

> Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope

> of the criminal activity jointly undertaken by the defendant (the jointly undertaken activity) is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(b), the Court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by defendant's agreement). The conduct of others that was in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision....

Petitioner submits this guideline clarification should be retroactively applied pursuant to 18 U.S.C. §3582. The Eleventh Circuit in United States v. Bugh, 28 F.3d 1084 (11th Cir. 1994) held that knowledge of the

whole conspiracy is insufficient to determine the entire drug amount foreseeable. The District Court failed to make a reasonable foreseeability finding on the drug quantity. See United States v. Foy, 28 F.3d 464 (5th Cir. 1994).

Petitioner contended below that the changes in the amendments to U.S.S.G. §3C1.1 and §1B1.3 served as grounds to collaterally attack the sentencing. The District Court rejected this argument.

Amendments to the U.S.S.G. comments which clarify the relevant section must be considered in direct appeal. United States v. Gardiner, 955 F.2d 1492 (11th Cir. 1992); United States v. Howard, 923 F.2d 1500 (11th Cir. 1991).

Petitioner contends that clarifying amendments must be considered not only on direct appeal, but also on haebeas corpus petitions and 28 U.S.C. §2255 petitions. Isabel v. United States, 980 F.2d 60 (1st Cir. 1992); United States v. Kissick, 69 F.3d 1048, 1052 (10th Cir. 1995). Petitioner asserts that there is a conflict among the circuits on this issue, with the First and Tenth Circuits holding that clarifying amendments to the U.S.S.G. must be considered in a §2255 petition, while the Eleventh and Second Circuits do not. See, e.g., Feldman v. United States, 926 F.Supp. 174, 177 (S.D. Ala. 1996) (the instant case); Keats v. United States, 856 F.Supp. 162, 167 (S.D.N.Y. 1994). Additionally, the Eighth Circuit in United States v. Wilson, 997 F.2d 429, 430 (8th Cir. 1993) implied that retroactive application of

post-sentencing amendments to the U.S.S.G. are not available in a §2255 challenge.

The District Court held that Isabel holding is "misguided" and declined to follow it. Petitioner contends that the District Court failed to follow binding Eleventh Circuit precedent in declining to follow Isabel. A clarifying amendment should be considered even if it becomes effective after the defendant was sentenced. United States v. Louis, 967 F.2d 1550, 1553 (11th Cir. 1992); United States v. Shores, 966 F.2d 1383, 1388 (11th Cir. 1992).

The District Court quoted McClesky v. Zant, 499 U.S. 467, 492, 11 S.Ct. 1454 (1991) to hold that "[p]erpetual disrespect for the finality of convictions disparages the entire criminal justice system." [District Court's order, p. 6, citing McClesky v. Zant]. Petitioner asserts that the District Court's conflict with Louis and Shores aside, the "perpetual disrespect" quotation is taken out of context. The preceding sentence reads:

> Far more severe are the disruptions when a claim is presented for the first time in a second or subsequent federal habeas petition. If 'collateral review of a conviction extends the ordeal of trial for both society and the accused,' Engle v. Isaac, supra, 456 U.S. [107], at 126-127, 102 S.Ct. at 1571, the ordeal worsens during

> subsequent collateral proceedings. Id., 499 U.S. at 492.

The McClesky decision went on to note, however, that the federal writ of habeas corpus "overrides all these considerations, essential as they are to the rule of law, when a petitioner raises a meritorious constitutional claim in a proper manner in a habeas petition." As Petitioner's pending 28 U.S.C. §2255 petition is his first, the reasons cited by the District Court for not relying upon Isabel; namely, the specter of endless habeas corpus petitions, in inapplicable and inappropriate.

Further, Petitioner asserts that the public policy reason cited by the District Court for denying retroactive application of the clarifying amendments to the U.S.S.G. -- the specter of endless habeascorpus petitions by incarcerated individuals each time a clarifying amendment is enacted -- is now inapplicable in light of the restrictions on federal habeas corpus petitions recently enacted by the U.S. Congress. Prison Litigation Reform Act of 1996.

C. Downward Adjustment for Minor Role.

Petitioner, at sentencing, requested a downward adjustment for role based on his limited involvement (arguendo) in the offense. The Court denied this request. Subsequent to Petitioner's sentencing, the United States Sentencing Commission modified the sentencing guidelines to make more equitable the punishment for minor players engaged in large scale drug conspiracies.

U.S.S.G. §2D1.1 Commentary Application notes suggests that there are certain instances in drug cases where the relevant conduct base offense level may over represent the seriousness of the Defendant's culpability in the criminal activity and as such warrant a departure from the guidelines. (See U.S.S.G. 1994, §2D1.1 application note (16)).

In the instant case, Petitioner's base offense level was set at 36. A two-level 3C1.1 increase resulted in an aggregate base level of 38. The guidelines based on a criminal history score of I were 235 to 293 months. Petitioner received a sentence of 235 months.

Assuming, arguendo, that Petitioner is guilty of the offense charged by the Government, the evidence plainly indicates that his was, at best, a very minor role in the offense. Petitioner's conduct as alleged by the Government warrants a §3B1.2 downward adjustment of four levels.

Subsequent to Petitioner's sentencing the Ninth Circuit Court of Appeals in United States v. Benitez, 34 F.3d 1489 (9th Cir. 1994), recognized that application of a minor role adjustment should be based on a relevant comparison of co-participants in the case at hand. The Court added that in order for the application to apply the defendant should be substantially less culpable than his co-participants. Using this analysis, it is clear that Petitioner should receive a four-level §3B1.2 downward adjustment.

Petitioner's culpability, if any, was less than most other participants. United

States v. Brown, 29 F.3d 9543 (5th Cir. 1994). The Government's own evidence and witnesses showed conclusively that Petitioner's participation was less than the average participant. United States v. Mitchell, 31 F.3d 271 (5th Cir. 1994).

Petitioner concedes in this case that his base offense level, based on the quantity of drugs in the total conspiracy (over 50 kilos), called for a base level of 36. Application note 16 suggests that the offense level should be greater than 36 for the provision to apply. In the instant case, it is respectfully submitted that the base level of 36 overstates the seriousness of Petitioner's culpability and that a departure was warranted.

The District Court held that subsequent case law may not be utilized for collateral attack of a sentence. Petitioner contends that the evidence as adduced by the Government plainly shows that his role was, at most, a minor one in the Richard Lynn organization. It would be a manifest injustice to deny Petitioner a four-step downward reduction for minor role in the offense.

CONCLUSION

Based on this Court's clear holding in Stinson, supra, Petitioner contends that the District Court and the Eleventh Circuit Court of Appeal erred in refusing to retroactively apply the clarifying amendments to the U.S.S.G. in his case. The Eleventh Circuit Court of Appeals, by affirming per curiam, ratified the District Court's decision as its precedent.

This Court should grant certiorari to resolve the split among the circuits with regard to retroactive application of clarifying amendments to the U.S.S.G in 28 U.S.C. §2255 petitions, and also to correct the District Court's and Eleventh Circuit's refusal to follow the binding precdent of Stinson.

Respectfully submitted,

Susan G. James
Attorney for Petitioner
600 South McDonough St.
Montgomery, Alabama 36104
334/269-3330

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-6404
Non-Argument Calendar

D.C. Docket Nos. 95-881-CIV-AH-M
89-CR-00072-AH

LARRY FELDMAN, a.k.a.
LANCE FLEMING, a.k.a.
LARRY GIVNER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the Unitd States District Court
for the Southern District of Alabama

(December 6, 1995)

Before EDMONDSON and BARKETT, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Circuit Rule 36-1.

Judgment Entered: December 6, 1996
for the Court: Miquel J. Cortez, Clerk

By: _____
Deputy Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LARRY FELDMAN,	)	
a.k.a. LANCE FLEMING,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Civil Action**
	)	**No. 95-00881-AH-M**
	)	**Criminal Action**
	)	**No. 89-00072-AH**
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

JUDGMENT

Having determined that the Petitioner is not entitled to the relief as requested in his Petition pursuant to 28 U.S.C. §2255, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that the Petition be **DISMISSED WITH PREJUDICE.**

DONE this 3rd day of April, 1996.

/s/_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LARRY FELDMAN, a.k.a. LANCE FLEMING,	)	
Petitioner,	)	
v.	)	**Civil Action No. 95-00881-AH-M**
	)	**Criminal Action No. 89-00072-AH**
UNITED STATES OF AMERICA,	)	
Respondent.	)	

ORDER

This matter is before the court on the "Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. §2255 or in the alternative 18 U.S.C. §3582(c)(2)" filed Larry Arnold Givner[1] ("Givner"). [Doc. #48]. The Government filed a Response to the Motion. [Doc. #57]. Givner

[1]Although Petitioner was indicted under the name Larry Feldman, a/k/a Larry Fleming, his real name is Larry Arnold Givner. Therefore, the Court will refer to Petitioner as Larry Givner.

filed an "answer to government's Response." [Doc. #58].

The Court finds that Givner's alternative motion pursuant to 18 U.S.C. §3582(c)(2) is inappropriate as Givner does not allege that he was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o)." 18 U.S.C. §3582(c)(2). Therefore, Givner's Motion insofar as it is brought pursuant to §3582(c)(2) is **MOOT.**

Upon review of Givner's §2255 Motion and the exhibits attached to such Motion and the arguments of the parties submitted in their briefs, the Court finds that Givner's §2255 Motion is due to be **DENIED**.

I. BACKGROUND

The briefs filed by Givner and the Government describe the procedural and factual

background of the underlying criminal action against Givner in detail. The Court will not restate such facts in totality. However, the following facts are important to Givner's Motion:

1. On November 17, 1989, a jury found Givner guilty of Count 4 of the Superseding indictment (violation of 21 U.S.C. §846).

2. On February 1, 1990, this Court sentenced Givner to 235 months imprisonment without parole to be followed by a five-year term of supervised release. In determining Givner's sentence, the Court relied upon evidence adduced during the trial to find that Givner was responsible for at least 50 kilograms of cocaine, that his sentence should be enhanced for obstruction of justice and that Givner failed to establish that he was entitled to acceptance of responsibility, a minor or minimal role reduction, or downward departure for substantial assistance.

3. Givner appealed his conviction and sentence on six grounds: (1) sufficiency of the evidence; (2) validity of a consensual search; (3) the exclusion of testimony relating to plea negotiations; (4) outrageous Government conduct relating to the actions of various Drug Enforcement Agents and the informant; (5) the exclusion of evidence relating to attorney-client privilege between the informant and his attorney; and (6) the findings at sentencing relating to the drug amount, obstruction of justice, Givner's effort to cooperate and his claim of acceptance of responsibility.

4. The United States Court of Appeals for the Eleventh Circuit affirmed Givner's conviction and sentence without opinion. The mandate issued on August 1, 1991.

5. On October 27, 1995, Givner's counsel filed the Motion that is now before this Court.

II. THE MOTION BEFORE THE COURT

A prisoner in federal custody may attack a sentence on the ground that "[1] the sentence was imposed in violation of the Constitution or laws of the United States, or [2] that the court was without jurisdiction to

impose such sentence, or [3] that the sentence was in excess of the maximum authorized by law, or [4] is otherwise subject to collateral attack...." 428 U.S.C. §2255. Givner argues that his sentence is "otherwise subject to collateral attack." Givner argues that he should be allowed to attack his sentence because changes in the facts of his case and changes in the Sentencing Guidelines have arisen after the affirmance of his conviction and sentence. Givner alleges that such changes expose a fundamental defect in his sentence. Givner raises four grounds to support his request for reduction or vacation of his sentence.

1. Givner alleges that he has discovered new evidence that shows he was not a part of the Richard J. Lynn conspiracy.

2. The commentary to Section 1B1.3 of the United States Sentencing Guidelines ("USSG") has been amended

to clarify that the amount of drugs attributable to a defendant/conspirator must be an amount that is "reasonably foreseeable" by the defendant. Givner argues that this Court did not find that it was "reasonably foreseeable" that Givner was connected with more than 50 kilograms of cocaine. Givner argues that such amended commentary entitles him to a resentencing hearing for a determination under the new "reasonably foreseeable" standard.

3. The commentary to Section 3C1.1 of the USSG had been amended to clarify the standard for an enhancement for obstruction of justice. Givner argues that such amended commentary states that an enhancement is only appropriate if a defendant actually obstructed justice. Givner argues that he is entitled to a resentencing hearing for a determination of whether he actually obstructed justice.

4. New case law interpreting Section 2D1.1 of the USSG mandates a resentencing hearing to determine whether Givner should be granted a downward adjustment for "minor role" in the offense.

A. Ground one "Not a Lynn Conspirator"

Givner argues that he is not guilty of the crime of which he was convicted, i.e., conspiracy to possess with intent to distribute cocaine (the Richard J. Lynn conspiracy). Givner attempts to escape the procedural bar for raising an issue that has already been decided by a jury and on appeal, by attaching statements made by co-conspirators Kevin Sheehy, Butch McKeown, Jack Marshall, and Bobby Eyster, after Givner's conviction and direct appeal. Such statements purport to show that Givner was not involved in the Lynn conspiracy. Givner argues that these statements were not available at trial because the declarants were protected by the

Fifth Amendment. Givner argues that the statements constitute new evidence. In addition, Givner attached to his Section 2255 Motion the notes of Special Agent Bergman detailing a conversation between Bergman and Confidential Informant Michael Golden. Givner states that these notes were discovered after his appeal.

The Court finds that the evidence contained in the co-conspirators and cooperating witnesses Steve Purvis and Hillery DeWeese. R2-194; R3-264-265; R4-479-483., Additional statements of opinion by other co-conspirators would be cumulative and self-serving. With respect to SA Bergman's notes, both Bergman and Golden testified at trial about their conversation and such notes do not raise "new evidence." R-5-697-700; R6-890. Therefore, Givner's Section 2255 Motion on the ground of newly discovered evidence is

insufficient to support such collateral attack because the record shows that Givner's "new evidence" was presented at Givner's trial and is not "new."

B. Ground Two "Relevant Conduct" and Ground Three "Obstruction of Justice

Grounds Two and Three of Givner's 2255 Motion assert that Givner may collaterally attack his sentence because the comments to Guideline Sections 1B1.3 (Relevant Conduct) and 3C1.1 (Obstructing or Impeding the Administration of Justice) have been amended by the Sentencing Commission to clarify the meaning of such Sections. The Court rejects Givner's contention that changes in the commentary on a section of the Guidelines may serve as a ground to collaterally attack a sentence that has been affirmed on appeal.

The Eleventh Circuit has held that amendments to the comments that merely clarify

the relevant section "must be considered" on direct appeal. United States v. Gardiner, 955 F.2d 1492, 1499 (11th Cir. 1992); see also United States v. Howard, 923 F.2d 1500, 1503-1505 (11th Cir. 1991). The Eleventh Circuit has not extended such holding to Section 2255 Motions. However, the United States Court of Appeals for the First Circuit, relying on Howard, **has** extended the Howard holding beyond a final decision of the Court of Appeals to a Section 2255 proceeding. Isabel v. United States, 980 F.2d 60 (1st Cir. 1992). In a review of a Section 2255 Motion the First Circuit held:

> It is true that a sentencing court applies the law in effect at the date of sentencing. Nevertheless, in interpreting an applicable guideline virtually all circuits have found or stated that it is appropriate to consider post-sentencing amendments that clarify but do not substantively change the guideline.

Id. at 62. This Court holds that the reasoning of the First Circuit is misguided

and insufficient to support such a holding and this Court declines to follow the First Circuit.

The Eleventh Circuit rule applies when the commentary is amended after sentencing, but before review on direct appeal. Such a rule is logical because, assuming a defendant exercises his right of appeal, an action against a defendant is not final until review by an appellate court. However, to extend such a holding to collateral attacks flys in the face of finality in criminal prosecutions. "Perpetual disrespect for the finality of convictions disparages the entire criminal justice system." McCleskey v. Zant, 499 U.S. 467, 492 (1991). Revisiting sentences that have been affirmed on direct appeal each time the Sentencing Commission "clarifies" the commentary to the Guidelines challenges the finality of convictions. In effect, no

sentence would be final as commentary is constantly being rewritten and "clarified." In the action before this Court, Givner was sentenced over six years ago; the Eleventh Circuit affirmed such sentence nearly five years ago; and Givner now attacks such sentence based upon alleged clarifying commentary subsequently adopted by the sentencing Commission. If this inmate is successful in this collateral attack, then he and all others similarly situated will be permitted to continue assaults on their sentences on every occasion the Sentencing Commission amends commentary in a fashion that is deemed "clarifying." There will never be finality in any federal criminal conviction as defendants will constantly attack their sentences when commentary language is changed. Defendants may file multiple habeas petitions spanning over many years and the United States

will have to be prepared to defend sentences **ad infinitum**. "Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes." **McCleskey v. Zant, supra**, 499 U.S. at 491 (citation omitted). The holding of the First Circuit unduly increases the amount of such collateral litigation and destroys the public's comfort in the finality of sentences. The burden on federal judicial resources will be astonishing. This Court holds that collateral review based on commentary "clarification" is not permitted because amendments to the commentary are not sufficient to meet the "otherwise subject to collateral review" standard of Section 2255. Therefore, the Court holds that Givner is not able to collaterally attack his sentence on

the ground that the comments to Guideline Section 1B1.3 and 3C1.1 have been "clarified."

C. Ground Four "Minor Role"

Givner argued at sentencing that he should receive a downward adjustment in his offense level under USSG Section 2D1.1 for a minor role in the offense. This Court denied Givner's request and Givner did not appeal such denial. In an effort to show cause for not appealing this Court's finding, Givner argues that recent case law has clarified Section 2D1.1 by holding that application of a minor role adjustment should be determined by comparing the conduct of the defendant with the conduct of the other co-conspirators. Givner asserts that this law changed after his appeal. Givner has not supplied the Court with legal support for the proposition that subsequent case law interpreting a section of the Guidelines may be asserted as a ground for

collateral attack of a sentence. In addition, none of the cases cited by Givner, which allegedly reinterpreted USSG Section 2D1.1, are cases from the Eleventh Circuit. Therefore, Givner's fourth ground for review is an insufficient ground to support a collateral attack of Givner's sentence.

III. CONCLUSION

The Court finds that Givner has failed to show that his conviction and sentence are "otherwise subject to collateral review" and, therefore, Givner has failed to establish a claim for relief under Section 2255. The Court **DENIES** Givner's 2255 Motion. [Doc. #48].

As the Court's holding is based on legal conclusions supported conclusively by the record and the file, no evidentiary hearing is necessary. Rule 8(a) Rules ---§2255 Proceedings; Cross v. United States, 893 F.2d

1287. 1292 (11th Cir.), **cert. denied**, 498 U.S. 849 (1990). Purely legal issues may be decided without an evidentiary hearing where the petitioner would suffer no prejudice as a result. Hinman v. United States, 730 F.2d 649, 652 (11th Cir. 1984). Where the record contains all of the evidence necessary for an adjudication of the petitioner's legal claims, there is no need for a hearing. Id. at 652-653. Even where allegations potentially raise issues of fact, a hearing is not required where the factual dispute would have no effect on the conviction, sentence or relevant proceeding. Id. at 653.

DONE this 3rd day of April, 1996.

\s_____
UNITED STATES DISTRICT JUDGE